IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36203

JIMMY THOMAS GLASS,	)	**2010 Unpublished Opinion No. 354**
	)	
Petitioner-Appellant,	)	**Filed: February 18, 2010**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed.

Deborah Whipple of Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Elizabeth A. Koeckeritz, Deputy Attorney General, Boise, for respondent.

PERRY, Judge Pro Tem

Jimmy Thomas Glass appeals from the district court's order summarily dismissing his application for post-conviction relief, in part, without an evidentiary hearing. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

The facts of this case are provided in detail by this Court's opinion in Glass's direct appeal. *See State v. Glass*, 146 Idaho 77, 190 P.3d 896 (Ct. App. 2008). Glass solicited an undercover police officer over the internet, believing the officer was a fifteen-year-old girl. Glass identified himself online under the username "letsgetkinky831" and the undercover officer identified himself under the username "Lisa200215ncal." During the course of the conversation, Glass invited the undercover officer to view a sexually-explicit image of himself and proposed a sexual rendezvous. The officer gave the address to a vacant apartment being used as part of a

sting operation. Glass agreed to meet "Lisa" at the apartment right away because he had to work later that day. He indicated that his name was Tom and he would be driving a black, two-door car. Shortly thereafter, the car drove into the complex parking lot, and Glass approached the apartment door and was arrested by police officers.

Glass was found guilty by a jury of enticing a child over the internet. I.C. § 18-1509A. The district court sentenced Glass to a unified term of fifteen years, with a minimum period of confinement of three years. Following Glass's I.C.R. 35 motion, the district court reduced his sentence to a unified term of fifteen years, with a minimum period of confinement of two years. This Court affirmed Glass's judgment of conviction in *Glass*, 146 Idaho 77, 190 P.3d 896.

Glass filed a pro se application for post-conviction relief alleging seven claims: (1) the state failed to disclose exculpatory evidence; (2) the state failed to disclose an expert witness; (3) the prosecutor used perjured testimony; (4) prosecutorial misconduct; (5) ineffective assistance of trial counsel for failing to investigate a potential defense; (6) he was not adequately advised of his rights pertaining to the psychosexual evaluation as required by *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006); and (7) ineffective assistance of appellate counsel. Counsel was appointed to represent Glass during the post-conviction proceedings. The state moved for summary dismissal of the first five claims on the basis that Glass had failed to state a claim upon which relief may be granted. Specifically, the state argued that the first four claims could have been raised on direct appeal and that Glass could not show deficient performance on his fifth claim. After a hearing on the state's motion, the district court dismissed the first five claims. The state conceded the validity of Glass's claim concerning a violation of *Estrada*, and the district court granted a new sentencing hearing. Glass conceded that his seventh claim was without merit and did not object to its summary dismissal. Glass appeals.

II.

ANALYSIS

Glass argues that the district court erred by summarily dismissing his claim that the state committed a *Brady*[1] violation by failing to disclose the seizure of his laptop computer from work as well as the results of any testing conducted on it. Additionally, Glass contends that the district court erred by summarily dismissing his claim of prosecutorial misconduct as it related to the

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

alleged *Brady* violation concerning his work computer. Glass does not challenge the summary dismissal of his remaining claims.

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). In post-conviction actions, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008).

Due process requires all material exculpatory evidence known to the state or in its possession be disclosed to the defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Dunlap v. State*, 141 Idaho 50, 64, 106 P.3d 376, 390 (2004). *See also* I.C.R. 16(a). There are three essential components of a true *Brady* violation. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Dunlap*, 141 Idaho at 64, 106 P.3d at 390. First, the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching. *Dunlap*, 141 Idaho at 64, 106 P.3d at 390. Next, the evidence must have been suppressed by the state, either willfully or inadvertently. *Id.* Finally, prejudice must have ensued. *Id.* The duty of disclosure enunciated in *Brady* is an obligation of not just the individual prosecutor assigned to the case, but of all the government agents having a significant role in investigating and prosecuting the offense. *State v. Avelar*, 132 Idaho 775, 781, 979 P.2d 648, 654 (1999); *State v. Gardner*, 126 Idaho 428, 433, 885 P.2d 1144, 1149 (Ct. App. 1994).

We first consider Glass's claim of a *Brady* violation for failure to disclose the seizure of his work computer. The computer had been seized by police pursuant to a search warrant. In its order summarily dismissing Glass's claim of a *Brady* violation, the district court held that the evidence was not material. A threshold question before undertaking a *Brady* analysis, however, is whether the evidence was disclosed. In this case, the seizure of Glass's work computer was the subject of extensive testimony offered at Glass's preliminary hearing which was subject to cross-examination by Glass's counsel. The transcript of that hearing was attached to Glass's application for post-conviction relief. Glass's own filings belie his claim that the computer itself was not disclosed by the state. If Glass wished to engage his own forensic examiner to review the computer's contents, he could have obtained access to the computer through an appropriate discovery request. Therefore, Glass has failed to establish a genuine issue that the state failed to

disclose material evidence. Accordingly, the district court did not err by summarily dismissing this claim.

Next we consider Glass's claim that the state committed a *Brady* violation by failing to disclose the results of forensic testing done on his work computer. At the preliminary hearing, the state's forensic examiner testified that a superficial examination of the hard drive revealed the existence of the precise phrase "letsgetkinky831." However, he testified that testing had not yet been completed. The state did not use the test results during Glass's trial and never disclosed whether the testing had been completed or the results of the completed evaluation to the defense. Glass's application infers that, because the state did not introduce the test results at trial, they must have been exculpatory. However, an applicant's conclusory allegations, unsupported by admissible evidence, are not sufficient to create a genuine issue of material fact. *See Roman*, 125 Idaho at 647, 873 P.2d at 901. In this case, Glass's application provided even less than conclusory allegations. It provided only implicit inferences and speculation that the results of forensic testing done on his work computer must have been exculpatory because the state did not present them at trial. Therefore, Glass has failed to establish a genuine issue that the state failed to disclose material, exculpatory evidence. Accordingly, the district court did not err by summarily dismissing this claim. Because we conclude that Glass's application failed to raise a genuine issue of material fact concerning a *Brady* violation, we need not address Glass's remaining claim that the *Brady* violation related to the disclosure of his work computer and its contents amounted to prosecutorial misconduct.

III.

CONCLUSION

Glass's application failed to raise a genuine issue of material fact that the state committed a *Brady* violation for failing to disclose the seizure of his laptop computer from work as well as the results of any testing conducted on it. Thus, Glass's application also failed to raise a genuine issue of material fact that the alleged *Brady* violation amounted to prosecutorial misconduct. Therefore, the district court did not err by summarily dismissing these claims. Accordingly, the district court's order summarily dismissing Glass's application for post-conviction relief, in part, without an evidentiary hearing is affirmed. No costs or attorney fees are awarded on appeal.

Judge GUTIERREZ and Judge GRATTON, **CONCUR.**